IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS MANUEL KEIFNER, Appellant.	)	2 CA-CR 2005-0152 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR2004-1195

Honorable Ted B. Borek, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Attorneys for Appellee

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By Nancy F. Jones — Tucson
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jesus Manuel Keifner was convicted of first-degree murder and drive by shooting. The trial court sentenced him to life imprisonment without the possibility of parole for twenty-five years for the murder conviction and a concurrent, aggravated term of seventeen years in prison for the drive by shooting conviction. Keifner appeals his convictions and sentences on numerous grounds.[1] Finding no reversible error, we affirm.

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[1]We granted Keifner's motion to file a brief exceeding the word limitation in Rule 31.13(b)(2), Ariz. R. Crim. P., 17 A.R.S., which was filed the same day as the brief, and after we had granted four motions to extend the time for filing the brief. But the 30,568-word opening brief includes over ten issues, many of which remind us of our supreme court's excellent discussion on appellate advocacy. Particularly appropriate here, the supreme court stated:

> Reasonable limits placed on appellate briefs neither inhibit nor detract from effective appellate advocacy. As we said in [*State v.*] *West*,
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> > The most effective briefs this court receives . . . *all* comply with the liberal page limitations of the rules. . . . Most [attorneys] have no trouble providing effective representation while filing sensibly sized briefs. Barring an advance showing of the most extraordinary circumstances, this court is committed, in all future cases, to enforcing the page limitations set by the rules.
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> 176 Ariz. [432,] 439, 862 P.2d [192,] 199 [(1993), *overruled in part on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998)]. . . .
>
> > Defendant's brief could easily have been filed within the parameters specified by the rules. . . . Instead of presenting a well-reasoned and legally supportable analysis of the record

¶2 We view the facts in the light most favorable to sustaining the convictions, resolving all reasonable inferences against the defendant. *State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). On March 20, 2004, Jason Tom drove his motorcycle to the Mission Tierra Apartments to pick up his cousin, Ruben Coronado, the eventual victim. At around the same time, Keifner also drove his car, accompanied by Charles Espinoza, to the Mission Tierra Apartments to pick up his cousin, Monica Gallardo.

¶3 Tom entered through the gate of the Mission Tierra Apartments and passed Keifner's Cadillac. As he passed the Cadillac, Tom heard Espinoza say, "What's up, Blood?" and use hand gestures Tom perceived as confrontational gang signs. Tom then picked up Coronado from Coronado's girlfriend's apartment. As they were leaving, they saw Espinoza and Keifner standing together with several other males in the breezeway. Tom

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> generated by this case, defendant has attempted . . . to include every conceivable argument. Contrary to defendant's approach, winnowing of issues and argument is essential to good appellate advocacy. Many of the "issues" raised have no arguable merit, and defendant gained nothing by presenting them to this court.

State v. Bolton, 182 Ariz. 290, 299, 896 P.2d 830, 839 (1995) (citations omitted) (emphasis in *West*). Counsel is cautioned that future motions to extend the word limit and time of briefing will not be automatically granted.

Additionally, counsel states that Keifner's federal and/or state constitutional rights were violated for every issue raised. We find the majority of those arguments are frivolous. But those that were adequately argued both here and in the trial court are addressed below. The remainder we do not address further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S.

and Espinoza exchanged confrontational words, and the two men engaged in a fist fight. After the fight broke up, another fist fight erupted between Keifner and Coronado that lasted a few minutes. At that point, several witnesses claimed that they heard members of both groups make references to guns and shooting members of the other group.

¶4 The fighting parties then went in different directions. Keifner and Espinoza returned to the Cadillac, where Gallardo had been waiting, and Espinoza took the driver's seat. Tom and Coronado also returned to their respective vehicles and began driving toward the exit gate. As Tom's and Coronado's vehicles approached the exit, Espinoza made a U-turn and blocked the exit with Keifner's Cadillac.

¶5 Tom saw the Cadillac blocking the exit and he said to Coronado, "I think they have a gun," and, "Let's just take another way." Espinoza began yelling, "What up, Blood? Open up the gate so I can kick your ass." Tom then turned his motorcycle around and rode away in the opposite direction. Coronado's truck rolled forward until it triggered the automatic gate to open, but then the truck began traveling away from the opening gate and the Cadillac that was blocking it.

¶6 At that point, Keifner picked up his rifle, with a red bandanna tied at the end of the barrel, and propped it on the passenger side window. Espinoza then encouraged Keifner to shoot the rifle, which Keifner did. Coronado died from the gunshot wounds.

¶7 During the murder investigation, Tom picked Keifner out of a photographic lineup as the person that Coronado had a fist fight with and Christina Shosie, a witness,

picked Keifner out of a photographic lineup as the person who fought with Coronado and made a threatening statement. Keifner was then arrested and charged with first-degree murder and drive by shooting. The state also alleged that the offenses were committed with the intent to promote, assist, or further a criminal street gang. At trial, Keifner argued that he had acted in self-defense and that he had shot the gun only because he had thought Coronado was also reaching for a gun. The jury found Keifner guilty on both the first-degree murder and drive by shooting charges, but also found that the state had failed to prove beyond a reasonable doubt that he had committed the offenses with the intent to promote, assist, or further a criminal street gang. Keifner now appeals his convictions and sentences.

I. *Batson*

¶8 Keifner argues the trial court erred by denying his challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), to the state's peremptory strikes of two Hispanic jurors. When reviewing a trial court's ruling on a *Batson* challenge, we defer to its factual findings unless clearly erroneous, but review its legal determinations de novo. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶9 During jury selection, prospective juror Corella stated that she was born in Sonora, Mexico, and grew up in Phoenix. Prospective juror Garza stated that she was born in Ohio and grew up in Illinois. The state used two of its six peremptory strikes on Corella

and Garza. Keifner posed a *Batson* challenge to the strikes based on the potential jurors' Hispanic ancestry.

¶10 The Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes of prospective jurors solely based upon race. *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719. A *Batson* challenge involves three steps. First, the party challenging the strike must make a prima facie showing that the strike was based on race. *Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162. Second, the party making the strike must then offer a race-neutral explanation. *Id.* That explanation "must be more than a mere denial of improper motive, but it need not be 'persuasive, or even plausible.'" *Id., quoting Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771 (1995). Third, the party challenging the strike must persuade the trial court that the proffered race-neutral explanation is pretextual. *Id.* During the third step, the trial court evaluates the credibility of the state's proffered explanation, considering factors such as "the prosecutor's demeanor; . . . how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 359, 123 S. Ct. 1029, 1040 (2003). Because the "trial court is in a better position to assess" credibility than we are, its "finding at this step is due much deference." *State v. Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d 833, 845, *cert. denied*, ___ U.S. ___, 127 S. Ct. 663 (2006).

¶11 The trial court did not make a finding as to whether Keifner had established a prima facie case of discrimination but, rather, looked to the prosecutor for a response to

the challenge. The prosecutor stated that Keifner had failed to make a prima facie case but also explained that Garza was a white female with a Hispanic surname. The court recognized that a question remained as to whether she was in fact Hispanic or merely had a Hispanic surname.[2]

¶12 The prosecutor stated that she struck Garza because of her "prior jury service and verdicts that she reached." The prosecutor also gave three reasons for striking Corella: her paralegal experience, her timid nature, and the fact that she "was willing to walk up close to" Keifner, a person accused of first-degree murder. The trial court found that these were reasonable, race-neutral explanations supported by the record, and it denied the *Batson* challenge.

¶13 The trial court did not err by finding the state's explanations as to each juror facially race neutral. *See State v. Cruz*, 175 Ariz. 395, 399, 857 P.2d 1249, 1253 (1993) (juror's demeanor can be race-neutral reason); *State v. Williams*, 182 Ariz. 548, 555-56, 898 P.2d 497, 504-05 (App. 1995) (potential juror's prior experience with legal system is race-neutral reason); *State v. Hernandez*, 170 Ariz. 301, 305, 823 P.2d 1309, 1313 (App. 1991) ("It is permissible to rely on a prospective juror's mode of answering questions as a

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[2]In doing so, it implicitly found that Keifner had made a prima facie case under step one of *Batson*. *Cf. State v. Hernandez*, 170 Ariz. 301, 304, 823 P.2d 1309, 1312 (App. 1991) (assuming trial court found defendant had made a prima facie case where trial court asked state to explain its strikes). And, because the prosecutor offered an explanation for her strikes, this preliminary issue became moot in any event. *See Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866 (1991); *State v. Rodarte*, 173 Ariz. 331, 333, 842 P.2d 1344, 1346 (App. 1992).

basis for peremptory selections."). And determining the validity of those explanations required the trial court to evaluate the sincerity of the prosecutor as well as the behavior of the jurors. These are credibility determinations and observations that the trial court was in the best position to make. *See State v. Roque*, 213 Ariz. 193, ¶ 16, 141 P.3d 368, 379 (2006) (Trial judge has a "superior opportunity to observe the jurors' demeanor and credibility."); *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845; *cf. State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) ("[T]he trial court is in a better position to judge whether [a] prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any."). We defer to those determinations here.

¶14 Keifner claims the prosecutor's proffered reasons for striking the two jurors apply equally to non-Hispanic jurors whom the prosecutor did not strike, evidencing discriminatory intent. Corella and a non-Hispanic juror both had paralegal experience, but the prosecutor gave additional reasons for striking Corella. And Garza, whom the prosecutor struck because she had been on a jury that returned a not guilty verdict, was apparently non-Hispanic. Striking her does not give rise to an inference of discriminatory intent.

¶15 Finally, Keifner argues that "statistical information supports the conclusion that striking Ms. Garza and Ms. Corella was racially-based." The parties exercised their peremptory strikes on a panel of twenty-six potential jurors, and there were three prospective jurors with Hispanic surnames. The prosecutor struck two of the three potentially Hispanic

jurors and one served on the jury.[3] A statistical disparity can constitute evidence of purposeful discrimination. *See Miller-El v. Dretke*, 545 U.S. 231, 240-41, 125 S. Ct. 2317, 2325 (2005). But it is only one factor the Supreme Court examined to determine whether *Batson* had been violated. None of the other factors exists here. And Keifner centered his *Batson* argument around three prospective jurors: Garza, about whom there were serious questions as to whether or not she was Hispanic; Cancino, who was Spanish and, according to Keifner, not the type of Hispanic who experiences racial prejudice in the Southwest; and Corella, the only undisputed Hispanic in the venire. Because there was only one Hispanic person and one potentially Hispanic person in the jury venire at the time the parties exercised their peremptory strikes, the statistical disparity alone does not suggest any error. Accordingly, the trial court did not err by denying Keifner's *Batson* challenge.

II. Gang-related Evidence

¶16 Keifner contends the trial court erred when it denied his motion to preclude evidence of gang affiliation and other gang-related evidence, arguing that the trial court erred in admitting the evidence because the danger of unfair prejudice substantially outweighed

[3]Keifner also argues that juror Cancino, who was born in Spain and came to the United States when she was three months old, is not of Mexican ancestry, and "the prejudices against Hispanics in the Southwest is specific to Mexican-ancestry Hispanics, not Spanish immigrants." But this distinction is not important to our resolution of this case.

its probative value.[4] Because the trial court is in the best position to determine the relevance and admissibility of evidence, *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994), we review its decision for an abuse of discretion, *see State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

¶17 "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401, 17A A.R.S. All relevant evidence is admissible unless otherwise prohibited by law. Ariz. R. Evid. 402, 17A A.R.S. Rule 403, Ariz. R. Evid., 17A A.R.S., however, provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The state alleged in the indictment that Keifner committed the offenses with the intent to promote, further, or assist a criminal street gang under A.R.S. § 13-604(T). That section increases the minimum, presumptive, and maximum prison terms and curtails early release availability for a defendant "convicted of" a gang-related offense. *See id*. And, because the state was required to prove that Keifner committed the offenses with the intent to promote, further, or assist a criminal street gang to have an enhanced sentence imposed

[4]Keifner's argument seems to suggest that the trial court erred by not severing the guilt determination phase from the sentencing phase of trial. But Keifner does not argue that the trial court committed this error. Therefore, we address and resolve the issue of relevance and unfair prejudice in the context of the entire trial.

under § 13-604(T), we conclude that the trial court did not err in finding that the evidence was relevant, had probative value, and was admissible.

¶18 Furthermore, "[a]ny evidence that is probative of guilt is thereby prejudicial to a defendant. Unfair prejudice is something different." *State v. Fillmore*, 187 Ariz. 174, 179, 927 P.2d 1303, 1308 (App. 1996). "[I]n reviewing the trial court's ruling, we must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994), *citing State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989). Although gang evidence carries a danger of unfair prejudice, taken in context with the other evidence of guilt, the trial court could conclude that the danger of this prejudice did not outweigh the probative value, a determination within the court's broad discretion. *See State v. Salazar*, 181 Ariz. 87, 91, 887 P.2d 617, 621 (App. 1994). Additionally, the jury concluded that the state did not prove that Keifner committed the offenses with the intent to promote, further, or assist a criminal street gang. Therefore, Keifner cannot show any prejudice even if the evidence was admitted in error.[5] *State v. Ayala*, 178 Ariz. 385,

[5]Keifner relies on *State v. Romero*, 178 Ariz. 45, 870 P.2d 1141 (App. 1993), as "[t]he primary case in Arizona which deals with the admissibility of evidence of gangs and gang affiliation." But evidence of gangs and gang affiliation is not treated differently under the Arizona Rules of Evidence from any other type of evidence. *See generally* Ariz. R. Evid., 17A A.R.S. And, because a trial court's analysis of evidence under Rules 401 and 403, Ariz. R. Evid., 17A A.R.S., is made on a case-by-case basis, we reject Keifner's contention that *Romero* provides guidance here.

387, 873 P.2d 1307, 1309 (App. 1994) (conviction reversed only if admission of contested evidence was "a clear, prejudicial abuse of discretion").

¶19 Keifner also cites an out-of-state case and minimally argues that the gang evidence was improperly admitted as prior bad acts evidence. The evidence here was properly admitted to support the state's allegation that the crime was committed in support of gang activity and to provide motive. Furthermore, because the jury found the allegation of gang activity was not proven, Keifer cannot show prejudice. *See id*.

¶20 Next, Keifner argues that "admission of expert testimony on gangs violated [his] right to confrontation and was improper under Rule 703," Ariz. R. Evid., 17A A.R.S. He also argues that Tucson Police Sergeant Nesbit's "testimony was based on hearsay and speculation and was therefore an improper attempt to admit hearsay evidence through a police officer, in violation of the confrontation clause" under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). While Keifner states that Nesbit's "testimony was based upon hearsay and speculation, rather than upon data of a type reasonably relied upon by experts in the field," he does not direct us to any hearsay statements made or relied upon by Nesbit, and we will not consider this issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S. ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Furthermore, because the jury found the allegation of gang activity unproven, Keifner cannot show prejudice. *See Ayala*, 178 Ariz. at 387, 873 P.2d at 1309.

Finally, to the extent Keifner is arguing the trial court erred by admitting Nesbit's testimony as an expert witness, we will not address the issue because it is not adequately argued in the brief. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

III. Detective Cassel's Testimony

¶21 Keifner argues that the "admission of highly prejudicial hearsay statements contained in [his] interview by Detective Cassel was improper under the Rules of Evidence, and denied [him] his rights to confrontation and to a fair trial." Although we review the trial court's decision to admit evidence for an abuse of discretion, *see State v. Hampton*, 213 Ariz. 167, ¶ 45, 140 P.3d 950, 961 (2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 972 (2007), we review its decision on the Confrontation Clause de novo, *see State v. Ruggiero*, 211 Ariz. 262, ¶ 15, 120 P.3d 690, 693 (App. 2005). The trial court admitted into evidence Keifner's tape-recorded statement to Cassel. Because some of Cassel's questions referred to statements made by other witnesses, Keifner moved to redact certain portions of the recording. The trial court granted some of the requested redactions but denied others.

¶22 Keifner argues that the admission of the following statement: "How come we got witnesses, over here, in the party area that said that they heard you say 'I'm gonna put a bullet in his head,'" violated his right to confrontation. The Sixth Amendment to the United States Constitution protects a defendant's "right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits the use of testimonial out-of-court statements if the

declarant does not testify at trial, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 68, 124 S. Ct. at 1374. But, where the declarant is subject to cross-examination at trial, the Court stated in dictum that "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n.9, 124 S. Ct. at 1369 n.9; *see also State v. Roque*, 213 Ariz. 193, ¶ 115, 141 P.3d 368, 396-97 (2006) (where "victims made their statements in court and stood subject to cross-examination, no confrontation issues arose"). Here, Shosie had told the detective that she heard Keifner say he was going to put a bullet in Coronado's head. She testified at trial and Keifner cross-examined her. Consequently, *Crawford* placed no constraints on the use of the statement. *See State v. Real*, ___ Ariz. ___, ¶ 5, 150 P.3d 805, ___ (App. 2007).

¶23 Keifner next argues that the statement should have been excluded as "inadmissible hearsay because it was a prior consistent statement used to bolster testimony of witnesses called at trial to establish that [Keifner] had in fact made th[e] statement." Rule 801(c), Ariz. R. Evid., 17A A.R.S., defines hearsay as "a statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove *the truth of the matter asserted*." (Emphasis added.) Here, the state did not offer Keifner's interview with Cassel into evidence to prove the fact that a witness heard Keifner say that he was going to "put a bullet into [Coronado']s head." Instead, the statement was offered so the jury could

hear Keifner's response to Cassel's questions about conflicting aspects of Keifner's version of the events. Thus, the statement does not constitute hearsay as Rule 801(c) defines it.

¶24 Keifner also argues that the trial court erred when it admitted the following from the taped statement: Cassel: "And there was never a weapon aimed at you. This truck was backing up, wasn't it?" Keifner: "Well I don't, no. He was going forward!" claiming they "were all hearsay statements which implied that Cassel was basing his assertions on his own personal knowledge or the statements of others and were highly prejudicial." But neither the question nor the answer contains hearsay, *see* Rule 801(c), Ariz. R. Evid., 17A A.R.S.; therefore we reject this argument. Keifner minimally argues that the admission of this statement violated his right to confrontation under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980), *overruled by Crawford*, but even assuming *Roberts* has continued viability, because the statement is not hearsay, the *Roberts* analysis does not apply. *See id.* at 65-66, 100 S. Ct. at 2538-39; *see also United States v. Baker*, 432 F.3d 1189, 1204 (11th Cir. 2005) (nontestimonial *hearsay* governed by *Roberts*) (emphasis added), *cert. denied*, ___ U.S. ___, 126 S. Ct. 1809 (2006).

¶25 Finally, Keifner argues that he was denied his right to a fair trial when Cassel's question, "And you guys started talking the Blood talk right then[?]" and Keifner's answer, "No. We did, see, it's a fuck it. And, and he just drove off," were admitted after the trial

court had ordered them redacted.[6] But Keifner did not object when that statement was played for the jury. And, although he correctly cites *State v. Smith*, 96 Ariz. 150, 152, 393 P.2d 251, 252 (1964), for the proposition that a prosecutor has an obligation to ensure that the evidence conforms to the court's evidentiary rulings, that case did not discharge his obligation to object to the admission of previously excluded evidence. Therefore, we review the admission of this statement for fundamental error. *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2, *cert. denied*, ___ U.S. ___, 126 S. Ct. 762 (2005). Fundamental error is error that goes to the foundation of a case such that the defendant could not have received a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To prevail on fundamental error review, a defendant must show that error occurred and that the error prejudiced the defendant. *Id*. ¶ 20.

¶26 Keifner contends that he was prejudiced by the admission of this statement because "it was evidence that [he] had been involved in using gang words when the evidence was that only Espinoza had talked the 'Blood' talk or used some type of gang signs." But the jury found that the state failed to prove the shooting was gang related; therefore, Keifner failed to meet the burden requiring him to show how he was prejudiced by the admission of the statement. Keifner minimally argues that the statement violated his right to confrontation. However, he did not explain why or how it does so; therefore, we reject this

[6]Keifner states that "[t]wo of the statements from the tape which the court had ordered redacted were not in fact redacted." But he only identifies and argues that the admission of one of those statements constituted error.

argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, *and the reasons therefor*, with citations to the authorities, statutes and parts of the record relied on.") (emphasis added).

IV. Shosie's Hearsay Statement

¶27 Keifner next argues that the trial court erred on several grounds in admitting Shosie's statement that she heard Keifner say he was going to put a bullet in Coronado. Because the trial court is in the best position to determine the relevance and admissibility of evidence, *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994), we review its decision for an abuse of discretion, *see State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996).

¶28 Keifner argues that the statement was inadmissible hearsay because it did not qualify as a recorded recollection. Specifically, Keifner argues there was no showing that the recorded recollection was accurate. But Keifner has not directed us to, nor can we find, where in the record he objected on this ground; consequently we review solely for fundamental error. *See Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2.

¶29 Rule 803, Ariz. R. Evid., provides recorded recollections are "not excluded by the hearsay rule, even though the declarant is available as a witness." A recorded recollection is defined as

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient

> recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

Ariz. R. Evid. 803(5). To obtain admission of a recorded recollection under Rule 803(5), a party must show that the recorded recollection is accurate. *See State v. Alatorre*, 191 Ariz. 208, ¶ 9, 953 P.2d 1261, 1264 (App. 1998).

¶30 Here, the statement was tape recorded and transcribed. At trial, Shosie agreed that she made the statement to Cassel, even though she could not remember what was said or who said it. Furthermore, when asked if she had read the transcript and agreed that she made the statements within it, Shosie testified that "if it's in the papers then [she] said it." She also testified that she told the truth and that her recollection of the words was fresh at the time of the interview, which took place the day of the shooting. During the interview, Shosie identified Keifner in a photographic lineup as the man who she saw fight with Coronado and say he was going to "put a bullet in [him]." Moreover, Cassel testified that "[Shosie] said that [Keifner] was the one that made the statement" and that the photograph she identified was Keifner's. Therefore, we find no error, fundamental or otherwise, when the trial court admitted the statement as a recorded recollection.

¶31 Keifner also minimally argues that the admission of the statement violated his right to confrontation because it did not fall within the recorded recollection hearsay exception. We review the trial court's decision on Confrontation Clause issues de novo. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 15, 120 P.3d 690, 693 (App. 2005). But Shosie

testified at Keifner's trial and Keifner cross-examined her. And, as we stated above, where the declarant is subject to cross-examination at trial, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9 (2004); *see also State v. Real*, ___ Ariz. ___, ¶ 5, 150 P.3d 805, ___ (App. 2007). Furthermore, even assuming the *Roberts* analysis applies as Keifner suggests, the statement falls within a firmly rooted hearsay exception; it has sufficient indicia of reliability. *See Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S. Ct. 2531, 2538-39 (1980), *overruled by Crawford*; *see also United States v. Baker*, 432 F.3d 1189, 1204 (11th Cir. 2005) (nontestimonial hearsay governed by *Roberts*). Therefore, we must reject Keifner's argument that admission of the statement violated his right to confrontation.

¶32 Keifner also argues that the statement was not a prior inconsistent statement and was inadmissible. But, because we conclude that the statement was admissible under Rule 803(5), the recorded recollection hearsay exception, we need not address the issue of whether it was a prior inconsistent statement under Rule 801(d)(1)(A), Ariz. R. Evid., 17A A.R.S.

¶33 Keifner argues that the "statements should nevertheless have been excluded because they were admitted for substantive purposes, provided the only proof of premeditation, [and] went to the foundation of the state's case as well as the heart of the defense theory." But Rule 803 places no restrictions on the use of evidence it excepts from

the hearsay rule. And *State v. Cruz*, 128 Ariz. 538, 627 P.2d 689 (1981), and *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982), upon which Keifner relies, concerned prior inconsistent statements admitted as impeachment evidence for substantive purposes, not recorded recollection under Rule 803(5).

¶34 Finally, Keifner argues, relying on *Allred*, that the trial court abused its discretion when it admitted Shosie's statement, claiming its prejudicial effect outweighed its probative value. But, in *Allred*, the court established the factors that should be considered in a trial court's balancing, pursuant to Rules 401 and 403, Ariz. R. Evid., 17A A.R.S., regarding evidence that was admitted under Rule 801(d)(1)(A). Here, we conclude that the statement was properly admitted under Rule 803(5); therefore, the factors enumerated in *Allred* do not apply and we reject this argument. Further, we find no abuse of discretion in the trial court's balancing.

V. Espinoza's Statements

¶35 Keifner argues that the trial court erred when it admitted Espinoza's hearsay statements. Because the trial court is in the best position to determine the relevance and admissibility of evidence, *Wood*, 180 Ariz. at 61, 881 P.2d at 1166, we review its decision for an abuse of discretion, *see Roscoe*, 184 Ariz. at 491, 910 P.2d at 642. At trial, Melissa de la Rosa testified that she heard Espinoza yelling at Coronado, "What up, Blood? Open up the gate so I can kick your ass." Jose Monreal, de la Rosa's boyfriend, also heard Espinoza yell, "What's up, Blood?" in a confrontational manner toward Coronado's truck.

But, because the statement was not offered for the truth of the matter asserted, it is not hearsay as defined by Rule 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove *the truth of the matter asserted*." (Emphasis added.); therefore, we need not address Keifner's contention that the trial court erred when it admitted the statement under Rule 801(d)(2).

¶36 Additionally, in stating the issue, Keifner contends that the admission of the statement violated the Confrontation Clause. But he does not adequately argue that point on appeal and it is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").

¶37 Finally, Keifner argues that the statement's probative value was outweighed by its unfair prejudice. "Any evidence that is probative of guilt is thereby prejudicial to a defendant. Unfair prejudice is something different . . . ." *State v. Fillmore*, 187 Ariz. 174, 179, 927 P.2d 1303, 1308 (App. 1996). Our supreme court has defined "[u]nfair prejudice [as] . . .'an undue tendency to suggest decision on an improper basis.'" *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403, Advisory Comm. Note. Keifner has not argued how Espinoza's statements were unfairly prejudicial to him; therefore, we reject this argument.

VI. Victims' Prior Bad Acts

¶38 Keifner argues that the preclusion of evidence of the victims' prior acts of violence violated his constitutional rights by denying him the right to present a defense. Keifner contends that "[e]vidence of the victims' prior acts of violence was admissible as corroboration of [his] testimony and theory of defense under Rule 404(B), Ariz. R. Evid., 17A A.R.S." Because the trial court is in the best position to determine the admissibility of evidence, *Wood*, 180 Ariz. at 61, 881 P.2d at 1166, we review its decision for an abuse of discretion, *see Roscoe*, 184 Ariz. at 491, 910 P.2d at 642. But we review constitutional issues de novo. *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶39 Prior to trial, Keifner moved to allow the defense to introduce the following: evidence that Coronado previously fought in the apartment complex, an incident report in which Coronado was found in possession of a handgun and shotgun, and the records of Tom's juvenile delinquency file or evidence regarding the incidents in them. The trial court ruled that Keifner could introduce evidence of the victims' character through reputation and opinion evidence, but precluded him from admitting specific instances of conduct unless Keifner had been aware of them.

¶40 Rule 404(b) states that

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But Keifner himself states that he wanted to admit the evidence of prior bad acts to show Coronado's and Tom's "propensit[ies] for violence." And, as Keifner points out, Rule 404(b) does not recognize corroboration as a nonpropensity purpose, nor does he cite any Arizona case supporting that proposition. Therefore, the trial court did not abuse its discretion when it excluded evidence of the victims' prior acts of violence.

¶41 Keifner argues that "[s]pecific instances of conduct are admissible in a trial for homicide regardless of whether [Keifner] knew about them." Under Arizona precedent, a defendant charged with homicide may be permitted to introduce evidence of specific acts of violence by the victim only when those acts were personally observed by the defendant or made known to the defendant prior to the homicide. *State v. Taylor*, 169 Ariz. 121, 124, 817 P.2d 488, 491 (1991). Keifner does not argue that he knew the victims or their past acts of violence prior to the shooting.

¶42 Nevertheless, Keifner cites out-of-state authority to support his argument that specific instances of conduct should be admissible in a murder trial regardless of whether the defendant knew of them. First, Keifner's theory of self-defense was that he reasonably believed Coronado was armed, and no evidence at trial indicated that Coronado was actually armed. Therefore, only the evidence of prior acts of which Keifner was aware was relevant. More importantly, Keifner has cited no Arizona cases supporting this proposition, and our supreme court has previously held that a defendant must have had personal knowledge of the specific act prior to the homicide. *Id.* at 124, 817 P.2d at 491. We have no authority

to overrule supreme court decisions. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), *quoting City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (we are required to follow the decisions of our supreme court and cannot "'overrule, modify, or disregard them'"). Therefore we reject this argument.

¶43 Furthermore, Keifner was not denied his right to present a defense. Keifner was permitted to present evidence that the victims were the first aggressors, that he believed they were armed, and that it was his belief that when Coronado ducked down in the truck he was reaching for a weapon. Consequently, the preclusion of the victims' prior bad acts, of which Keifner was unaware, did not deny him the "'meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146 (1986), *quoting California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984).

VII. Preclusion of Impeachment Evidence

¶44 Keifner argues that the trial court erred when it precluded "impeachment evidence of the state's key witness" because it prevented him from being able to present a "complete defense." We review a court's decision to admit or exclude evidence for an abuse of discretion. *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). But we review constitutional issues de novo. *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). At trial, Keifner sought to introduce evidence about Tom's gang membership, about lifting his shirt and showing a gun on another occasion, about his prior

arrest, and about his prior offense involving a weapon. The trial court precluded all of the proffered evidence under Rule 608, Ariz. R. Evid., 17A A.R.S.

¶45 Rule 608(b) states that:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

None of the evidence Keifner sought to introduce concerned Tom's character for truthfulness or untruthfulness. Moreover, the victim's prior arrests, convictions, or acts of violence are relevant to a justification defense only when those acts are personally observed by the defendant or made known to the defendant prior to the homicide. *Taylor*, 169 Ariz. at 124, 817 P.2d at 491. And Keifner had no personal knowledge of the instances he sought to admit; therefore, any attempt to impeach Tom on this collateral issue would have been improper.

¶46 Keifner relies on *Public Service Co. of Oklahoma v. Bleak*, 134 Ariz. 311, 656 P.2d 600 (1982); *State v. Hannon*, 5 Ariz. App. 291, 425 P.2d 861 (1967); and *State v. Martinez*, 121 Ariz. 62, 588 P.2d 355 (App. 1978), to support his argument that the evidence of specific instances of conduct should have been admitted to impeach Tom. But, in *Bleak*, the court addressed the issue of whether a *party* could be impeached with evidence of acts. 134 Ariz. at 323, 656 P.2d at 612. Similarly, in *Hannon*, the court addressed

whether the *defendant* could be impeached with evidence of acts. 5 Ariz. App. at 293, 425 P.2d at 863. And, in *Martinez*, the court stated that "[c]are must be taken to distinguish situations in which evidence is offered to impeach the witness from those in which evidence is offered as an admission by the defendant." 121 Ariz. at 63, 588 P.2d at 356. Tom was not a party in this case; thus, his prior statements and conduct were collateral to the issue of Keifner's guilt or innocence. *See State v. McGuire*, 113 Ariz. 372, 373, 555 P.2d 330, 331 (1976) (evidence is collateral if it could not properly be offered for any purpose independent of the contradiction). Moreover, *Hannon* preceded the effective date of the Rules of Evidence and *Bleak* relied on *Hannon*. Therefore, we conclude the trial court did not abuse its discretion when it precluded evidence of Tom's prior acts.

¶47 Finally, the trial court's decision did not deny Keifner his right to present a defense. Keifner was permitted to impeach Tom with his inconsistent testimony in Espinoza's trial and his prior felony conviction. Consequently, the exclusion of specific instances of conduct relating to a collateral issue for impeachment purposes did not deny Keifner the "'meaningful opportunity to present a complete defense.'" *Crane*, 476 U.S. at 690, 106 S. Ct. at 2146, *quoting Trombetta*, 467 U.S. at 485, 104 S. Ct. at 2532.

VIII. Reference to "Mug Shot" System

¶48 Keifner argues that the trial court erred when it denied his motion for a mistrial after a detective referred to the "mug shot" system during his testimony. We review a trial court's denial of a motion for mistrial for an abuse of discretion, bearing in mind that a

mistrial is a dramatic remedy that "should be granted only when it appears that that is the only remedy to ensure justice is done." *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991); *see also State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988) ("Motions for new trial are disfavored and should be granted with great caution."). "[T]he trial judge is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement was made, and the possible effect on the jury and the trial." *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004). We therefore will overturn a trial court's decision only for a clear abuse of discretion that is clearly injurious to the defendant. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

¶49 The state asked Detective Cassel during direct examination, "How do you go about putting together a photographic lineup?" Cassel answered, "[W]e have two databases where we can obtain photographs. The first one is through our mug system. And a little background, any time someone gets arrested . . . ." Defense counsel then moved for a mistrial before Cassel could finish his explanation. After discussing the defense's concerns with counsel, the court denied the motion and instead allowed the state to clarify with the witness that lineup photographs come from different sources, not just from arrests. The court also ruled that the lineup itself would not be admitted into evidence to obviate any suggestion created by the manner in which Keifner was depicted that his photograph was from a prior arrest. Direct examination resumed, and Cassel testified that the photographs

used in the photographic lineups come from multiple sources, for instance, from the Motor Vehicle Division.

¶50 "[T]he introduction into evidence of mug shots or the mention of the fact that the police had photos of the defendant taken sometime before the crime can be error when it infers a prior arrest." *State v. Bruni*, 129 Ariz. 312, 320, 630 P.2d 1044, 1052 (App. 1981). But, here, Cassel testified that the police obtain the photographs from multiple sources and never stated where he obtained the photograph of Keifner that was used in the lineup. Accordingly, we reject Keifner's argument that the trial court erred when it denied his motion for a mistrial.

¶51 While Keifner is correct that the admission of evidence about a defendant's mug shot can constitute reversible error, *see State v. Kelly*, 111 Ariz. 181, 189-90, 526 P.2d 720, 728-29 (1974); *State v. Jacobs*, 94 Ariz. 211, 214, 382 P.2d 683, 685 (1963), his argument that the trial court erred because "it would [have been] clear to the jury that [the photograph] was not from the arrest in the instant case" is without merit. Although Keifner argues that the lineup was created on March 20, 2004, one day prior to Keifner's arrest, and that his photograph had "in fact come from a prior arrest," Cassel testified that the photographs used in lineups come from several sources. And the lineup was not admitted at trial. Therefore, there is nothing in the record indicating that the state admitted evidence of Keifner's mug shot.

IX. A.R.S. § 13-205

¶52 Keifner argues that the new version of A.R.S. § 13-205 should be applied retroactively to his case because it is currently on appeal. But, in *Garcia v. Browning*, No. CV-06-0320-PR, ¶ 20, 2007 WL 419645, at *5 (Ariz. Feb. 9, 2007), the supreme court explicitly held that the changes to § 13-205 "apply only to offenses occurring on or after its effective date of April 24, 2006." Here, the offense was committed in March 2004, approximately two years before the new version of § 13-205 became effective. Therefore, the new version of § 13-205 has no application to this case.

¶53 Keifner next argues that the previous version of § 13-205, which was applied to his case, was unconstitutional because it required a defendant to prove self-defense by a preponderance of the evidence.[7] As a result, he contends it impermissibly shifted the burden of proof from the state to the defendant. We review de novo a challenge to the constitutionality of a statute. *State v. Casey*, 205 Ariz. 359, ¶ 8, 71 P.3d 351, 354 (2003).

¶54 Under the United States Constitution, states may require a defendant to bear the burden of proving self-defense. *Martin v. Ohio*, 480 U.S. 228, 236, 107 S. Ct. 1098, 1103 (1987). And our supreme court has held that requiring a defendant to prove self-defense does not violate the Arizona Constitution. *Casey*, 205 Ariz. 359, ¶ 15, 71 P.3d at 355; *see also State v. Farley*, 199 Ariz. 542, ¶ 17, 19 P.3d 1258, 1261-62 (App. 2001). Although the state is required to prove beyond a reasonable doubt every element of an

[7]At the time of trial A.R.S. § 13-205(A) provided that "a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense."

offense, it carried no burden of proof on self-defense under the prior version of § 13-205. *See State v. Sierra-Cervantes*, 201 Ariz. 459, ¶ 11, 37 P.3d 432, 434 (App. 2001); *Farley*, 199 Ariz. 542, ¶¶ 10-11, 19 P.3d at 1260. Furthermore, "[a]s long as a jury is properly instructed that it may convict only if the state has proven each element of the crime beyond a reasonable doubt, it does not offend due process to require the defendant to prove by a preponderance of the evidence that . . . he acted in self-defense." *Farley*, 199 Ariz. 542, ¶ 13, 19 P.3d at 1261.

¶55 Keifner nevertheless argues that in *Casey*, 205 Ariz. 359, n.3, 71 P.3d at 58 n.3, the supreme court recognized that there could be a potential "conflict found in murder cases" and that conflict exists in this case. He also relies on the dissent in *Martin* to support his contention that § 13-205 is unconstitutional when applied in first-degree murder cases. The *Martin* dissent's chief concern was defenses that negate an element of an offense under the Ohio definition of first-degree murder. 480 U.S. at 237-38, 107 S. Ct. at 1103-04 (Powell, J., dissenting). But, justification under the prior version of § 13-205 was an affirmative defense; conversely, the absence of justification was not an element of homicide. *See* A.R.S. § 13-1105 (first-degree murder statute does not require jury to find that defendant acted without justification); *Farley*, 199 Ariz. 542, ¶ 14, 19 P.3d at 1261 (absence of justification not element of homicide). Keifner testified that he had fired the rifle, but claimed that he did so in self-defense. No conflict between the premeditation element and the self-defense claim existed. Therefore, the concerns expressed in the *Martin*

dissent do not apply here, and we conclude that the application of § 13-205, as it existed at the time of Keifner's trial, did not violate his constitutional rights.

X. Jury Instructions

¶56 Keifner argues that the trial court erred when it refused to give three of his requested jury instructions. We review the trial court's refusal to give a requested jury instruction for an abuse of discretion. *See State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). But we review de novo whether a requested jury instruction properly states the law. *State v. Morales*, 198 Ariz. 372, ¶ 4, 10 P.3d 630, 632 (App. 2000).

¶57 Keifner first argues that the trial court erred when it failed to give the following instruction: "You may still consider all evidence of self-defense in deciding whether there is a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." The trial court refused to give the instruction because it found that it was already covered by the other instructions.

¶58 A defendant is entitled to a jury instruction on any theory for which there is reasonable support in the evidence. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003). But, "when the substance of a proposed instruction is adequately covered by other instructions, the trial court is not required to give it." *State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000). This applies even if the proffered instruction is an accurate statement of the law. *State v. Romero*, 135 Ariz. 102, 104, 659 P.2d 655, 657 (App. 1982).

¶59 Here, the jury was instructed twice that it must determine the facts "from the evidence produced in court," and the instructions did not differentiate between the state's evidence and self-defense evidence. It was also instructed to decide whether Keifner was guilty beyond a reasonable doubt "based on [its] consideration of the evidence" without any distinction between perceived classes of evidence. Finally, the jury was instructed to "consider all the evidence" in determining whether Keifner acted in self-defense. Thus, the subject matter of Keifner's proposed instruction was adequately covered by other instructions.

¶60 Additionally, the requested instruction conflates the two separate inquiries with separate burdens of proof and could have misled the jury. Therefore, the trial court did not abuse its discretion when it refused to give Keifner's requested instruction. *See State v. Rodriquez,* 145 Ariz. 157, 175-76, 700 P.2d 855, 873-74 (App. 1984) (court may refuse to give misleading instruction).

¶61 Next, Keifner argues the trial court erred when it did not instruct the jury that when a defendant asserts self-defense, the defendant does not admit the elements of first-degree murder. Keifner requested the instruction after the prosecutor stated in closing arguments that she was

> not going to spend a whole lot of time on [the lesser-included offenses of first-degree murder] in this first closing because given the defense in this case of self-defense, [she could not] imagine that [defense counsel] [wa]s going to make any serious argument to [the jury] that this was anything less than a thought out decision to kill Ruben Coronado.

The trial court refused to give the instruction, stating: "It's pretty clear in the instructions . . . his position is self-defense . . . . [T]he fact he acknowledges there's a death is not an admission . . . to first degree murder."

¶62 The trial court instructed the jury that what is said in closing argument is not evidence, that the jury's duty is to determine the facts, and that the state bears the burden of proving the charges beyond a reasonable doubt. The jurors were instructed on the elements of first-degree murder, second-degree murder, negligent homicide, manslaughter, self-defense, justifiable use of force, and defense of another. Finally, the court instructed the jurors that "[i]f [they] find the defendant has proved self-defense by a preponderance of the evidence, [they] must find the defendant not guilty of the crimes charged." Consequently, we conclude the content of the requested jury instruction was covered by the instructions the court did give to the jury. *See Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d at 1015.

¶63 Keifner also argues that by refusing to give the instruction that by asserting self-defense he had not admitted the elements of first-degree murder, he was denied his right to present his alternate theory that he was only guilty of manslaughter. But, as we stated above, the trial court instructed the jury on the elements of manslaughter. Therefore, the trial court did not abuse its discretion when it refused to give Keifner's requested instruction regarding self-defense and the admission of elements of first-degree murder.

¶64 Keifner next argues that the trial court erred when it refused to give his requested instruction that there is no duty to retreat before a person may lawfully act in self-defense. But the trial court instructed the jury:

> The use of physical force or deadly physical force is justified if a reasonable person would have reasonably believed that immediate physical danger appeared to be present. . . . Actual danger is not necessary to justify the use of physical force or deadly force in self-defense.
>
> . . . .
>
> If the defendant provoked the use or attempted use of physical force, self-defense is not available to that defendant unless two things happened;
>
> One, the defendant withdrew from the encounter;
>
> And, two, the other person continued or tried to use physical force against the defendant.

The requested instruction was already covered by another instruction. The instruction does not state the defendant is required to withdraw, unless he was the aggressor. A reasonable jury would understand that by instructing it that when the defendant was the initial aggressor there was a duty to retreat, there is no similar duty when the defendant was not the initial aggressor. Therefore, the trial court did not abuse its discretion when it denied Keifner's request because, again, the instruction was already covered by one the trial court gave to the jury. *See Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d at 1015.

¶65 Keifner also argues that "the jury was not properly instructed on the unanimity requirement as to the affirmative defense." But, because Keifner did not object on this

ground below, we review this issue only for fundamental error. *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2, *cert. denied*, ___ U.S. ___, 126 S. Ct. 262 (2005). The trial court gave the following jury instruction: "[Y]our verdict in this case, if you return a verdict, must be unanimous. . . . All 12 of you must agree whether the verdict is guilty or not guilty." By unanimously finding Keifner guilty of first-degree murder, the jury simultaneously and necessarily found that he had no affirmative defense to that offense. Therefore, we find no error, fundamental or otherwise, because the trial court's unanimity instruction was adequate.

¶66 Next, Keifner argues that the trial court erred when it failed to "instruct the jury as to the concept of imperfect self defense." Again, because Keifner failed to object on this ground below, we review the issue solely for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). While a defendant is entitled to a jury instruction "on any theory reasonably supported by the evidence," *see Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d at 347, we find that the jury was properly instructed in this case. Consequently, we conclude that the trial court did not fundamentally err when it failed to give this unrequested instruction.

¶67 Keifner next argues that the trial court fundamentally erred in instructing the jury on reasonable doubt pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). But our supreme court has repeatedly approved the *Portillo* instruction, *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 48, 72 P.3d

831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999), and we have no authority to overrule those decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), *quoting City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993) (we are required to follow the decisions of our supreme court and cannot "'overrule, modify, or disregard them'").

XI. Aggravated Sentence

¶68 Keifner argues that the aggravated sentence for drive by shooting was imposed in violation of *State v. Waggoner*, 144 Ariz. 237, 697 P.2d 320 (1985), and Rule 16.1(b), Ariz. R. Crim. P., 16A A.R.S., because the state did not give him timely notice of the presence-of-an-accomplice aggravating factor. We review the legality of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶69 Prior to trial, Keifner moved to preclude evidence of the presence-of-an-accomplice aggravating factor based on lack of notice, which the trial court denied, finding it was inherent in the indictment. The court imposed an aggravated prison term of seventeen years based on two aggravating factors: (1) the jury's finding that accomplices were present, and (2) the fact that Keifner had taken a weapon to the incident and used it.

¶70 A defendant must receive notice of the aggravating factors on which the state intends to rely, in accordance with the requirements for notice of sentence enhancement allegations. *State ex rel. Smith v. Conn*, 209 Ariz. 195, ¶ 10, 98 P.3d 881, 884 (App. 2004). A defendant must receive notice of sentence enhancement allegations before trial

commences. *Waggoner*, 144 Ariz. at 239, 697 P.2d at 322. But "reference in the indictment to the number of the statute providing for enhanced punishment . . . is adequate notice of the state's intent to [aggravate the defendant's] sentence under that statute." *Id*. Here, the indictment named both Keifner and Espinoza and cited A.R.S. §§ 13-301, 13-302, and 13-303, the statutes governing accomplice liability, and A.R.S. § 13-702(B)(4), the statute authorizing an aggravated sentence when the offense is committed in the presence of accomplices. And Keifner does not even argue any prejudice from the allegedly untimely notice. Therefore, we conclude that the notice Keifner received complied with the due process requirements in *Waggoner*.

¶71 Keifner next argues that the trial court committed fundamental error when it imposed an aggravated sentence on the drive by shooting conviction in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Because Keifner did not object on this ground below, we review this issue only for fundamental error. *See Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2. Once a single aggravating circumstance, either compliant with or exempt from the *Blakely* requirements, has been properly established, the range of punishment to which the defendant is exposed is increased, and a trial court may find and consider other aggravating circumstances that have not been presented to a jury in determining the appropriate sentence within that range. *Id*. ¶ 26; *State v. Molina*, 211 Ariz. 130, ¶ 16, 118 P.3d 1094, 1098-99 (App. 2005).

¶72 Although the presence of accomplices was properly established as an aggravating circumstance, Keifner nevertheless argues that the imposition of an aggravated sentence constituted fundamental error because *Martinez* was wrongly decided. But, as we have stated above, we have no authority to overrule the supreme court's decisions. *See Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d at 1009, *quoting Leroy's Liquors, Inc.*, 177 Ariz. at 378, 868 P.2d at 961 (we are required to follow the decisions of our supreme court and cannot "'overrule, modify, or disregard them'"). Therefore, the trial court did not commit error, fundamental or otherwise, when it imposed an aggravated sentence on the drive by shooting conviction.

Conclusion

¶73 For the foregoing reasons, Keifner's convictions and sentences are affirmed.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
GARYE L. VÁSQUEZ, Judge